No. 91.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

CHARLES R. FISCHER, Commissioner of Insurance of the State of Iowa, as Receiver for the American Life Insurance Company, *Petitioner*,

vs.

AMERICAN UNITED LIFE INSURANCE COMPANY, JOHN G. EMERY, Commissioner of Insurance of the State of Michigan, as Permanent Liquidating Receiver of the American Life Insurance Company of Detroit, Michigan, and DAN E. LYDICK, Receiver of the American Life Insurance Company of Detroit, Michigan, *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR CHARLES R. FISCHER, COMMISSIONER OF INSURANCE OF THE STATE OF IOWA, AS RECEIVER FOR THE AMERICAN LIFE INSURANCE COMPANY.

JOHN N. HUGHES,
WILLIS J. O'BRIEN,
JOHN N. HUGHES, JR.,
Des Moines, Iowa,
Counsel for Petitioner.

INDEX.

Pages

CITATIONS.

Cases:

Pages

CITATIONS.

Pages

CITATIONS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 91.

CHARLES R. FISCHER, Commissioner of Insurance of the State of Iowa, as Receiver for the American Life Insurance Company, *Petitioner*,

vs.

AMERICAN UNITED LIFE INSURANCE COMPANY, JOHN G. EMERY, Commissioner of Insurance of the State of Michigan, as Permanent Liquidating Receiver of the American Life Insurance Company of Detroit, Michigan, and DAN E. LYDICK, Receiver of the American Life Insurance Company of Detroit, Michigan, *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR CHARLES R. FISCHER, COMMISSIONER OF INSURANCE OF THE STATE OF IOWA, AS RECEIVER FOR THE AMERICAN LIFE INSURANCE COMPANY.

OPINIONS BELOW.

The opinion of the District Court (R. 435-450) is unreported. The opinion of the Circuit Court of Appeals (R. 487-508) is reported in 117 Fed. (2d) 811.

JURISDICTION.

The judgment and decree of the Circuit Court of Appeals was entered on February 24, 1941 (R. 488-509). The Petition for a Writ of Certiorari was filed May 20, 1941, and was granted October 13, 1941. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE.

This controversy arises out of the insolvency of the American Life Insurance Company of Detroit, Michigan. The subject of the controversy is the right to possession for administration of securities, for the enforcement of lien rights against the securities, of the face value of over $3,600,000.00 deposited with the Insurance Commissioner of Iowa for the benefit of policyholders of the American Life Insurance Company of Des Moines, Iowa, pursuant to the statutes of the State of Iowa (R. 199, 342). The Michigan Company was adjudicated insolvent as of April 12, 1938.

The American Life Insurance Company of Des Moines, Iowa, was a stock corporation organized under the laws of Iowa in 1900. It was a going business, solvent and had a surplus in addition to its paid-up capital (Ex. "B", R. 403-405). The American Life Insurance Company of Detroit, Michigan, was a stock corporation organized under the laws of the State of Michigan in 1907 (R. 191, 192). After the purchase of all of the stock of the Iowa Company on July 30, 1921, by written contract, the Michigan Company took over the business and assets of the Iowa Company, Exhibit "A" (R. 203). On this date the Iowa Company had on deposit with the Insurance Commissioner of Iowa securities of the face value of $2,930,840.71, in accordance with the require-

ments of the Iowa statutes, this amount representing the net cash value or legal reserve of the policies then in force of the Iowa Company (R. 192). Supplementary contracts, Exhibits "B" and "C", were entered into between the companies December 27, 1922, and October 24, 1923, to complete the transaction. The substance of each contract is the same. The reinsurance agreement, Exhibit "A", (R. 203) with its provision for maintaining the deposit of securities in the same manner as was required of the Iowa Company under the Iowa statute was approved by a commission consisting of the Governor, Commissioner of Insurance and Attorney General of Iowa, and by the Insurance Commissioner of Michigan, in accordance with the respective laws of the two states (R. 203).

Prior to the execution of Exhibit "A" July 30, 1921, all of the policies of insurance issued by the Iowa Company were signed and delivered at the home office of the Company in Des Moines, Polk County, Iowa, (R. 193). Each of said policies had printed on the face of the contract in large letters the following: *"The full reserve on this policy is secured by a deposit of approved securities with the State of Iowa,"* (Exhibit "F"—R. 229). In Section 6, General Provisions of the policy contract, is the provision: *"The legal reserve on this policy shall be invested in approved securities and deposited with the State of Iowa as required by law"*, (Exhibit "F"—R. 233). The Michigan Company did not attempt to rewrite the Iowa policies of insurance but issued to each policyholder a document entitled "Certificate of Assumption", which provided as follows: "This is to certify that the above numbered policy issued by the American Life Insurance Company of Des Moines, Iowa, has been assumed according to its terms, provisions and values by the American Life Insurance Company, Detroit, Michigan, *and the American Life Insurance Company, Detroit, Michigan, will carry out all the provisions of said policy and perform all*

*of the obligations therein contained as fully as the same would or should have been performed by the American Life Insurance Company of Des Moines, Iowa, * * *"* (Exhibit "E"—R. 227).

The written agreements between the two companies, Exhibits "A", "B" and "C", each contained the following provisions:

> "* * * and covenants and agrees to and with the American Life Insurance Company of Des Moines, Iowa, and to and with each of the holders of policies and contracts herein referred to * * *", and
>
> "5. *The transfer hereby made is subject to the requirements of the statutes of the State of Iowa, relative to the deposit with the Commissioner of Insurance of that State of securities representing the net cash value of outstanding contracts* of life insurance, endowments, or annuities, and it is understood that many of the securities hereby transferred are now in the custody of said Commissioner of Insurance of the State of Iowa by virtue of deposits made in pursuance of such statutes.
>
> "6. It is further agreed by said American Life Insurance Company, Detroit, Michigan, *that the deposits required by the laws of the State of Iowa to be made with the Commissioner of Insurance on all contracts of life insurance, endowments, or annuities issued by said American Life Insurance Company, of Des Moines, Iowa, and hereby reinsured, will be now and hereafter maintained at all times, both in amount and character of securities, as would have been required of said American Life Insurance Company, of Des Moines, Iowa, under the laws of said State of Iowa.* The amount of such deposit required shall be determined by valuation of policies to be made on January first and July first of each year." (R. 207, 211, 217.)

The Michigan Company did not question its obligation to maintain the deposit in accordance with the requirements of the Iowa statutes and regularly made the necessary adjustments to maintain the amounts to equal the net equity or legal reserves for the Iowa policies from 1921 until the

insolvency proceedings against it on April 12, 1938, (R. 193).

The Iowa Company, when the agreement between the two companies was made, had on deposit with the Insurance Commissioner of Iowa original securities of the face value of $2,930,840.71, being equal to the net cash value or legal reserve of all policies issued and in force in the Iowa Company. On April 12, 1938, there were on deposit with the Insurance Commissioner of Iowa original securities of the face value of $3,600,205.59. The net cash value or legal reserve of all of the policies of insurance originating in the Iowa Company and in force on March 31, 1938, was $3,574,-634.55. By stipulation of the parties, the value of the securities is agreed to be 25% less than the face value of $3,600,-205.59, so that the value of the deposited securities in the possession of the Iowa Receiver is $900,051.39 short of being sufficient to cover the amount of the lien representing the net cash value or legal reserve of the policies originating in the Iowa Company, for whose benefit the deposit was made, (R. 199-200). The stipulation of facts agrees that the value of the deposited securities is less than the net cash value or legal reserve of the policies originating in the Iowa Company, and the Michigan Receiver could have no interest in the deposited securities because the amount of the liens created by the Iowa statutes exceed the admitted value of the deposited securities.

On April 12, 1938, the Commissioner of Insurance of Michigan took possession of the Michigan Company as custodian and on June , 1938, the Circuit Court of Ingham County, Michigan, appointed the Commissioner temporary receiver. The order of the Court contains the following:

> "Commissioner of Insurance of the State of Michigan be and is hereby appointed temporary receiver of said defendant company and all and singular the prop-

erty and assets of every nature wherever situated, held, owned or controlled by the defendant company, * * *" (R. 283).

On September 16, 1939, the Circuit Court for Ingham County, Michigan, entered an order appointing the Commissioner permanent receiver, and contains the following:

> "Commissioner of Insurance of the State of Michigan is hereby appointed Permanent Liquidating Receiver of the American Life Insurance Company, a Michigan insurance corporation, and of all of its assets and business wherever situated, and by virtue of the statute in such case made and provided, particularly Section 12266 Compiled Laws of Michigan for 1929, is hereby vested with title to all property, assets and business of said company wherever situated, real, personal and mixed of whatever kind or description, statutory or other deposits or pledges of securities, contracts and rights of action, * * *" (R. 286).

On July 29, 1938, the District Court of Tarrant County, Texas, appointed an ancillary receiver for the assets of the Michigan Company in Texas (R. 290).

On Petition of the Attorney General of Iowa filed June 17, 1938, the District Court of Polk County, Iowa, appointed the Commissioner of Insurance of Iowa temporary receiver of the Michigan Company on said date, and on October 30, 1939, made the appointment permanent (R. 304). Pursuant to the order of Court on June 17, 1938, the Iowa temporary receiver took possession of all of the securities deposited with the Insurance Commissioner of Iowa and said securities are now in his possession as receiver in Polk County, Iowa (R. 200).

On January 2, 1940, petitioner filed his complaint in the Federal Court for the Southern District of Iowa to obtain a decree to determine the status of the parties under the Iowa law, to prevent active interference by the nonresident respondents with administration upon the personal property

in petitioner's possession, to remove adverse claims thereto and to enforce liens created under the laws of Iowa and the respective policy contracts, assumption agreements and reinsurance agreements (R. 1-9). The Federal District Court granted the relief sought (R. 444, 448).

On November 17, 1939, the American United Life Insurance Company of Indianapolis, Indiana, entered into a written agreement with the Michigan Receiver for the reinsurance of the business of the Michigan Company, which agreement recognized the questions at issue in this suit would have to be determined by a court of competent jurisdiction before it could be effective as to policyholders of the Iowa Company, (Exhibit "P"—R. 313, 338, 340). Under the agreement with the Indiana Company an initial lien was fixed at 75% of the reserve value of each policy contract with interest at 4% per annum from April 12, 1938.

On April 12, 1938, the securities on deposit with the Insurance Commissioner of Iowa consisted of bearer bonds, real estate mortgages securing promissory notes, real estate contracts, vendor lien notes secured by mortgages and trust deeds, and policy loan notes secured by policy reserves, (Exhibit "R"—R. 342, 355). For all of these securities the original instruments evidencing the indebtedness were in possession of the Insurance Commissioner of Iowa April 12, 1938, and thereafter, as Receiver in Des Moines, Polk County, Iowa.

Sections 9105, 9106, 9107, 9108, 9111, 9112, 9114, Code of Iowa, 1939, provide for an insurance commission of Iowa consisting of the Governor, Commissioner of Insurance and Attorney General to authorize and approve contracts of reinsurance. The authorization and approval of the contracts in this case was by unanimous decision of the Iowa Commission (R. 203, 208, 214). The Insurance Commissioner of Michigan approved the contracts in accordance with the laws of that state (R. 203, 214).

Sections 8654 and 8655, Code of Iowa, 1939, required the deposit by the Iowa Company of statutory designated securities with the Insurance Commissioner of Iowa equal to the net cash value of all of the policies of the Iowa Company then in force (R. 219, 220). The Michigan Company complied with the provisions of the foregoing statutes without objection up to the time of insolvency (R. 193, 194).

Sections 8664, 8741 and 8741.1 of the Code of Iowa, 1939, provide for the approval, withdrawal and exchange of securities on deposit with the Commissioner of Insurance of Iowa. In compliance with these statutes, the Michigan Company continued withdrawal and substitution of securities from the deposit until the time of its insolvency, April 12, 1938, (R. 193, 194).

Section 8665, Code of Iowa, 1939, provides that companies having securities on deposit may, until default, collect the dividends or interest thereon (R. 221). The Michigan Company complied with this statute up to the time of its insolvency.

Sections 8660, 8661 and 8662, Code of Iowa, 1939, provide for an examination, a receiver and a decree (R. 220, 221). The appointment of the Iowa receiver by the District Court of Polk County, Iowa, is in compliance with the foregoing statutes.

Section 8663, Code of Iowa, 1939, provides that the securities on deposit with the Insurance Commissioner of Iowa shall vest in the State for the benefit of the policies on which such deposits were made and for a division of the proceeds among the policyholders or the purchase of reinsurance for their benefit (R. 221). Under this section the title to the deposited securities automatically vested in the State of Iowa on April 12, 1938. Prior to June 17, 1938, and to the present date there have been no proceedings in

Iowa looking to ancillary administration of the deposited securities by the Michigan receiver.

Section 8613.1, Code of Iowa, 1939, requires the Commissioner of Insurance of Iowa to be receiver or liquidating officer (R. 218).

All of the foregoing Statutes as set forth in the Code of Iowa, 1939 were on August 24, 1921, and now are in full force and effect (R. 218).

The respondents-appellees are each nonresidents of the State of Iowa and while making no move to secure the deposited assets through ancillary receivership in Iowa, are making adverse claims to and creating a cloud upon the title to certain of the securities in the possession of the Iowa Receiver which were secured by real property in states other than Iowa, were making collections and exercising dominion and control over nonresident debtors without having in their possession the original evidence of indebtedness and were interfering with and preventing administration upon the securities in the enforcement of the lien rights created in favor of the policyholders originating in the Iowa Company by the statutes of Iowa, the policy contracts, the assumption agreements and the reinsurance agreements, by the Iowa Court and as adjudicated by trial and decree of the Iowa Court. The testimony in the record and the pleadings of the parties respondent deny the right of the Iowa State Court to enforce the lien rights against the deposited assets in the possession of the Iowa Receiver and assert the claim that said assets are for the benefit of all policyholders of the Michigan Company to be administered only by the Michigan State Court. (R. 167, 168, par. 17; 176, 177, par. 36; 152, 153, par. 17; 161, par. 36.)

QUESTIONS PRESENTED.

1. The Federal Court for the Southern District of Iowa has jurisdiction under Sections 24 and 57 of the Judicial Code, Section 41, Title 28, and Section 118, Title 28, U. S. C. A., in a suit begun by a statutory receiver appointed by the Iowa State Court, being authorized by said Court to begin the suit, to determine the status of the parties under the Iowa law, to permit the enforcement of a lien and administration upon personal property within the Southern District of Iowa in the possession of the Iowa Receiver, pursuant to the laws of Iowa, as against nonresident defendants, including the domiciliary receiver appointed by the Michigan State Court, which receiver claims and is asserting title to said personal property.

2. Under Section 8663, Code of Iowa, upon the insolvency of the Michigan Company, the securities deposited with the Insurance Commissioner of Iowa vested, by operation of law, in the State of Iowa for the benefit of the policyholders for whom such deposits were made, and the Michigan receiver as statutory successor to the Company did not acquire title to, nor the Michigan State Court jurisdiction of, such securities on deposit in Iowa.

3. The petitioner, as Commissioner of Insurance of Iowa, was a statutory trustee and, upon insolvency of the Insurance Company, was appointed statutory receiver to administer, pursuant to statutory directions, the deposited securities for the policyholders for whose benefit the deposit was ... le, because

(a) Under the statutes of Iowa title to the deposited securities vested by operation of law in the State of Iowa upon the insolvency of the Company which was adjudicated to be as of April 12, 1938;

(b) The statutes of Iowa provided a protective lien in favor of each individual policyholder originating in

the Iowa Company and constituted the petitioner a trustee and receiver to carry out the mandatory provisions of the Iowa statutes and either liquidate the deposit or use the same to purchase reinsurance for such policyholder;

(c) The reinsurance agreements, the policy assumption agreement of the Michigan Company, and the policy contracts originating in the Iowa Company included the statutes of Iowa which inhered in and were a part of each of said instruments.

4. There is no jurisdictional clash with the Michigan receiver which precludes the Federal District Court for the Southern District of Iowa from adjudicating under Section 57 of the Judicial Code, title, right to possession and administration for foreclosure of a lien against property located in Iowa, because

(a) The rights of the Michigan receiver in the deposited securities are clearly subordinate to those of lien beneficiaries until such liens have been satisfied under Iowa law;

(b) The fact that the petitioner is a receiver appointed by the Iowa State Court arises from the method of lien enforcement provided by the Iowa statutes, which provide a substantive means of enforcing such lien rights upon property located in Iowa by vesting of title in the State of Iowa upon insolvency of the Company and appointment of petitioner as receiver to carry out the statutory disposition of the deposit;

(c) The Michigan receiver could have no interest in the deposited securities over the prior lien rights for which the Iowa Commissioner, as receiver, was authorized to act, except to receive any surplus remaining after the lien rights have been satisfied, and since it is admitted that the deposited securities are less in value than the amount of the lien, there is no interest to which the Michigan receiver's right could ever attach.

5. The decision of the Circuit Court of Appeals is a collateral attack on the appointment of petitioner as receiver

by the Iowa State Court and the jurisdiction of the Iowa State Court.

6. The law and local policy of the State of Iowa permit a creditor or claimant to proceed against a debtor's assets located within Iowa through appropriate courts even though a receiver may have been appointed for the debtor in the State of the debtor's domicile.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred in its decision and decree:

1. In denying jurisdiction of the subject matter of this suit and petitioner his rights to the procedure and remedy provided in Sections 24 and 57 of the Judicial Code.

2. In denying jurisdiction of this suit on the ground that the Michigan receiver as statutory successor to the Company acquired title to all the Company's assets wherever situated and the Michigan State Court jurisdiction thereof.

3. In denying jurisdiction of this suit because of its failure to hold that under Section 8663, Code of Iowa, the securities on deposit with the Insurance Commissioner of Iowa, on insolvency of the Company, vested by operation of law in the State of Iowa for the benefit of policyholders for whom such deposits were made.

4. In denying jurisdiction of this suit and thereby collaterally attacking the jurisdiction of the Iowa State Court and its Receiver.

5. In denying jurisdiction of this suit on the ground that the Commissioner of Insurance of Iowa was a mere contractual custodian, bailee or pledgee of the securities deposited with him, when the statutes of Iowa constituted him trustee with title for the purpose of enforcing a protective

lien in favor of each individual policyholder originating in the Iowa Company.

6. In denying jurisdiction of this suit on the ground that there is a jurisdictional clash between the Michigan and Iowa Courts in this case.

7. In denying jurisdiction of this suit by determining an important question of local Iowa law in a manner directly in conflict with the applicable decisions of this Court and the law of the State of Iowa, which permit a lien holder or creditor to proceed against an insolvent debtor's assets in the State of Iowa even though a receiver may have been appointed by the State Court of the insolvent's domicile.

SUMMARY OF ARGUMENT.

I. The Circuit Court of Appeals erred in denying the Federal Court jurisdiction of the subject matter of this suit.

A. In denying petitioner his rights to the procedure and remedy provided in Sections 24 and 57 of the Judicial Code.

B. Petitioner's action is not an interference with the administration by a state court of property of an insolvent insurance company within the prohibition of the authorities cited by the Circuit Court of Appeals in support of its decision.

II. The Circuit Court of Appeals in denying jurisdiction of the Federal Court on the theory that the Michigan receiver became statutory successor of the insurance company, with title to its property wherever situated, overlooked the established rules of law that

A. A statutory successor's title is subject to the same liens and equities as the corporation;

B. The statutory successor's right to administer the corporation's property is subject to the public policy of the state where the property is situated, in accordance with the statutes and laws of the state.

III. The Circuit Court of Appeals erred in failing to hold that under Section 8663, Code of Iowa, the securities on deposit with the Insurance Commissioner of Iowa on insolvency vested by operation of law in the State of Iowa for the benefit of policyholders for whom such deposits were made.

IV. The Circuit Court of Appeals erred in collaterally attacking the appointment of petitioner as receiver and denying the jurisdiction of the Iowa State Court.

V. The Circuit Court erred in holding that the Commissioner of Insurance of Iowa was a mere contractual custodian, bailee or pledgee of the securities deposited with him, when the statutes of Iowa constituted him a trustee with title for the purpose of enforcing a protective lien in favor of each individual policyholder originating in the Iowa company.

VI. The Circuit Court of Appeals erred in holding there is a jurisdictional clash between the Michigan and Iowa Courts in this case.

VII. The Circuit Court of Appeals erred in determining an important question of local Iowa law in a manner directly in conflict with the applicable decisions of this court and the law of the State of Iowa which permit a lien holder or creditor to proceed against an insolvent debtor's assets in the State of Iowa even though a receiver may have been appointed by the State Court of the insolvent's domicile.

ARGUMENT.

I.

THE CIRCUIT COURT OF APPEALS ERRED IN DENYING THE FEDERAL COURT JURISDICTION OF THE SUBJECT MATTER OF THIS SUIT.

A.

In denying petitioner his rights to the procedure and remedy provided in Sections 24 and 57 of the Judicial Code.

Section 57 of the Judicial Code, Section 118, Title 28, U. S. C. A., provides the procedure by which may be enforced as against nonresident defendants any legal or equitable claim to personal property within the district where such suit is brought, and likewise to remove any incumbrance, lien or cloud upon the title to such personal property.

The relevant terms of this Section are:

> "When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be;"

This is a diversity of citizenship suit with the requisite amount in controversy and was brought under Section 24 of the Judicial Code, Section 41, Title 28, U. S. C. A., and the Section above quoted, by the petitioner against American United Life Insurance Company of Indianapolis, Indiana, John G. Emery, Commissioner of Insurance of the State of Michigan, as Permanent Liquidating Receiver of the Amer-

ican Life Insurance Company of Detroit, Michigan, of Lansing, Michigan, and Dan E. Lydick, Ancillary Receiver of the American Life Insurance Company of Detroit, Michigan, of Fort Worth, Texas, (R. 2-3).

The Iowa State Court authorized the petitioner to institute this suit in the Federal Court to the end that the questions involving the right, title and possession of the securities as between petitioner and the nonresident parties claimants might be finally adjudicated (R. 371).

The purpose of this suit was to obtain a decree in the Federal Court to determine the status of the parties under the Iowa law as between the petitioner and nonresident parties defendant, to prevent active interference by nonresident defendants with administration upon the personal property in the possession of the Iowa Receiver by the Iowa State Court, to remove adverse claims and a cloud upon the title to personal property within the Southern District of Iowa, and to enforce liens created under the laws of Iowa, the policy contracts, the assumption agreements and the reinsurance agreements in favor of policyholders whose contracts originated in the Iowa Company and were not rewritten by the Michigan Company.

The complaint shows that the subject matter, the *res*, is within the territorial jurisdiction of the Federal District Court of the Southern District of Iowa, the amount involved exclusive of interest and costs is in excess of $3,000.00, and the pleadings admit the diversity of citizenship and residence between the petitioner and all respondents who are necessary parties. The complaint also contains the allegations with reference to the property involved, its situs and the basis of petitioner's claim to equitable relief under the Federal statute (R. 1-9).

Upon order and direction of the Federal District Court in Iowa, summons issued directed to each of the nonresident

defendants and service was made pursuant to Federal statute and rule (R. 10-11).

Section 57 of the Judicial Code, Section 118, Title 28, U. S. C. A., is the proper method for enforcement of petitioner's rights.

Bede Steam Shipping Co. v. *N. Y. Trust Co.*, 54 Fed. (2d) 658.

Omaha National Bank v. *Federal Reserve Bank of Kansas City*, 26 Fed. (2d) 884. Certiorari denied 279 U. S. 619, 73 Law Ed. 539.

The defendants first appeared specially and moved to dismiss the suit for lack of jurisdiction of their persons and of the subject matter. The motions were overruled. Answers and counterclaims were filed by the respondents, Michigan Receiver and American United Company, and an answer filed in behalf of the Texas Receiver. Each of the parties in their pleadings sought affirmative relief (R. 143, 154, 169). The action was instituted as one *in rem* but by the appearance and pleadings of each of the respondents the Court acquired jurisdiction over their persons.

Franz v. *Buder*, 11 Fed. (2d) 854 (C. C. A. 8), Certiorari denied, 273 U. S. 756, 71 Law Ed. 876, 47 Sup. Court 459.

Ferdig Oil Co. v. *Wilson*, 91 Fed. (2d) 857 (C. C. A. 10).

The pleadings of the respondents state, the adverse claims to the securities in the possession of the Iowa Receiver, which are the subject of this suit and consist of original securities and obligations of a face value in excess of $3,600,000.00, and are demand bonds, promissory notes and mortgages, trust deeds and promissory notes and real estate contracts, a number of the promissory notes being secured by mortgages and deeds of trust on real property located in Michigan and Texas and states other than Iowa. They also state the liens claimed

and clouds upon the title to said personal property and the interference by the nonresident respondents in the administration of the property for the enforcement of liens created under the laws of Iowa, the policy contracts, the assumption agreements and the reinsurance agreements in favor of the policyholders whose contracts originated in the Iowa Company, by the Iowa State Court (R. 1-9, 143-148, 148-163, 163-178, 178-190). The facts upon the trial support petitioner's allegations (R. 130-132, 201-202).

The Circuit Court of Appeals decided the District Court did not have jurisdiction of the subject matter of the suit. The Honorable John B. Sanborn wrote the majority opinion and Honorable Harvey M. Johnsen a dissenting opinion. The questions submitted for consideration by this Court are clearly demonstrated by the conclusions in each of the opinions. Judge Sanborn concludes as follows:

> "Our conclusion is that the court below lacked jurisdiction because the Michigan court had first acquired jurisdiction of the securities on deposit in Iowa. But, even if that conclusion were not justified, we would still be of the opinion that the court below could not be called upon to decide which of the two state courts has the right to administer these assets of the Michigan Company and to determine controversies respecting them. The decrees and rulings of these two state courts relative to their respective jurisdictions are not subject to review or to collateral attack in a federal court. (Citing cases.) If, by reason of the reinsurance agreements and the laws of Iowa, the Iowa court has sole jurisdiction over the securities of the Michigan Company on deposit in Iowa, as appellee contends, it is the duty of that court to exercise it. If the Michigan court, on the other hand, has such jurisdiction, as we think it has, it must resolve the controversy over these assets. The Iowa Receiver, under the circumstances, cannot invoke the jurisdiction of a federal court to resolve his own doubts as to the jurisdiction of the Iowa court which has appointed him and which has already ruled that it has the jurisdiction which he claims that it has. We are convinced that the rights

of the parties to this action with respect to the assets of the Michigan Company on deposit in Iowa and their controversy over whether the Michigan court or the Iowa court is to administer these assets were not for determination by the court below."

Judge Johnsen concludes as follows:

"Had the Iowa deposit been one of mere bailment with no charge or lien on the securities, I should have no difficulty, naturally in concurrence. To hold, however, that orderliness in the domiciliary liquidation of a foreign corporation requires that a sister state be left impotent to prescribe an unsubserviated right of confirming and enforcing a lien created under its laws, upon property located in the state, is to me a bit ominous. Under such a rule, every lien creditor of a foreign corporation, including a mortgagee of real estate, despite his superior rights in the property, must, where insolvency occurs, be regarded as a vagrant suppliant, no matter what fortification the terms of this contract, or the laws of the state under which the lien was created, may have attempted to afford him. State sovereignty, commercial practicality, and the dominant rights of lien position will, I am sure, ultimately compel a retreat from the point of absolutism which has now attritively been reached in our decisions, under the jurisdiction of orderly liquidation. * * *

"Since the Iowa court is not attempting to administer assets as such, but merely to enforce specific local liens, just as might ordinarily be done in a simple foreclosure action, I do not believe that we are able to dispose of this situation on the ground that the federal courts will not determine questions between conflicting state court receiverships. Indeed, since the decision in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, it seems rather clear to me that in cases resting on mere diversity of citizenship, the federal courts are simply substituting for the state courts and owe the duty of performing all their functions, unless some limitation exists upon their jurisdiction, as, for example, in labor injunction cases. Here, the federal court was simply asked to perform the function of an Iowa state court, in declaring the status of the parties under the Iowa law. This it clearly had

jurisdiction to do and owed the duty of doing. No uncertainty could exist under the law of Iowa as to the lien rights against the deposit. The State of Iowa had a sovereign right to provide a substantive means of enforcing these lien rights, to which its laws had given birth, upon property located in its jurisdiction, irrespective of whether any Michigan receivership ever existed. In the exercise of their substituted jurisdiction, it was the duty of the federal courts in this case to declare and give effect to Iowa law in the same manner as the courts of Iowa would have been obliged to do."

The equity division of the Iowa State Court, upon the trial of the question of the insolvency of the Michigan Company and whether or not the receiver should be appointed to take possession of the deposited securities, decided the question of its jurisdiction, and by decree determined the question now submitted. The decree in part is as follows (R. 305):

"That proceedings were pending against the defendant Company under Sections 8661 and 8662 of the Code of Iowa, 1935, on June 17, 1938, and the securities of the defendant Company on deposit with the Insurance Commissioner of Iowa on said date vested in the State of Iowa for the benefit of the policies on which such deposits were made and said title is now so vested, and administration, division or application of the securities or the proceeds from said securities shall be in accordance with the laws of the State of Iowa and more particularly Section 8663 of the Code of Iowa, 1935."

The decree of the Federal District Court found the Michigan Company insolvent as of April 12, 1938, and determined title to the deposited securities vested in the State of Iowa on that date. It will be noted in the above decree the Iowa State Court decided proceedings were pending against the Michigan Company under Sections 8661 and 8662 of the Code of Iowa, and that by virtue thereof the securities on deposit vested in the State of Iowa June 17, 1938. Section 8663 provides two contingencies under either of which

title can vest in the State of Iowa 1. Upon insolvency of the Company. 2. When proceedings are pending under the above Sections. The date fixed by the Iowa State Court is not incorrect nor is it inconsistent with the vesting of title by operation of law upon insolvency as determined by the decree of the Federal Court in accordance with the statute and the admitted fact.

The Federal District Court confirms the decree of the Iowa State Court in deciding in part as follows (R. 435):

> "Finding as I do that the original contract of reinsurance was valid and subsisting at all times from and after its consummation and that the deposits in the hands of the Commissioner of Insurance vested in the State of Iowa, it would appear that the plaintiff is correct in the position taken and he is entitled to the relief demanded.
>
> "Neither can I see anything in the contention of the defendants that this court and the courts of Iowa are without jurisdiction in these proceedings. As I have hereinbefore held and as I have tried to point out herein the State is attempting to protect by a primary receivership property in the hands of the State of Iowa.
>
> "The action brought by the plaintiff is one *in rem* and the defendants have not only answered, but the defendant John G. Emery, Commissioner of Insurance of the State of Michigan, as permanent liquidating receiver, and the American United Life Insurance Company, have filed counterclaims asking that the funds in the hands of the Insurance Commissioner as receiver be delivered to them and the receiver for the American Life Insurance Company in Texas asks for general equitable relief. It therefore appears that not only has this court jurisdiction of the subject matter but also of the parties." (R. 444-445.)

The decree of the Federal District Court conformed to the conclusions of law in the decision quoted above (R. 448-449).

Section 8663, Code of Iowa, is as follows:

> "Sec. 8663.—*Securities.* The securities of a defaulting or insolvent company, or a company against which proceedings are pending under Sections 8661 and 8662, on deposit shall vest in the state for the benefit of the policies on which such deposits were made, and the proceeds of the same shall, by the order of the court upon final hearing, be divided among the holders thereof in the proportion of the last annual valuation of the same, or at any time be applied to the purchase of reinsurance for their benefit."

It is therefore erroneous to say that "The Iowa Receiver, under the circumstances, cannot invoke the jurisdiction of a Federal court to resolve his own doubts as to the jurisdiction of the Iowa court which has appointed him and which has already ruled that it has the jurisdiction which he claims that it has," as stated in the decision of the Circuit Court, because in the light of the purpose of the suit herein stated it is obvious that the Iowa Court does not have extra territorial jurisdiction outside the limits of the State of Iowa to enforce its decree, and the procedure and remedy provided by the Federal statute is the proper method to permit the Iowa Court and its Receiver as against nonresident parties to have their status declared and their rights determined under the Iowa law. By the same reasoning there can be no interference with the jurisdiction of the Michigan Court and authority of its Receiver by any action of the Federal Court in Iowa because the jurisdiction of the Michigan Court is limited by the territorial boundaries of that State. The personal property involved in this suit has its situs in the State of Iowa in the possession of the Iowa Court. *Chase* v. *Wetzlar*, 225 U. S. 79, 56 L. Ed. 990; *Scottish Union & Nat. Ins. Co.* v. *Bowland*, 196 U. S. 611, 49 L. Ed. 619; *Omaha Nat. Bank* v. *Fed. Res. Bank*, 26 Fed. (2d) 884 (C. C. A. 8); Restatement of Conflict of Laws, Secs. 51, 52. This property has never been within the jurisdiction

of the Michigan Court or its Receiver. The sovereignty of the State of Michigan and the jurisdiction of its courts do not extend to embrace property not situated within the territorial jurisdiction of the State. *Overby* v. *Gordon*, 177 U. S. 214, 222, 44 Law Ed. 741.

The forceful reasoning of Judge Johnsen aptly contraverts such decision and expresses petitioner's position supporting the jurisdiction of the Federal Court of the subject matter of this suit, in the following language:

> "The statutes of Iowa required a domestic company to deposit securities equal to the net cash value of its policies, for the purpose of providing a protective lien in favor of each individual policyholder. They constituted the Insurance Commissioner a trustee of the assets for this purpose, and, as a matter of administrative facilitation, provided that on insolvency the full legal title should automatically vest in the state. This status and these rights were specifically continued under the terms of the reinsurance agreement. So far as the deposit was concerned, the policies remained in practical effect domestic in character. Even, however, if the deposit had not been grounded on a statutory prescription and a valid recognition of, and agreement to continue, that status, but had been simply a voluntary deposit made by the Michigan Company for the protection of the policyholders of the Iowa Company, it would have had equal significance and effect under Iowa law. *State ex rel. Gibson* v. *American Bonding & Casualty Co.*, 206 Iowa 988, 221 N. W. 585.
>
> "In this situation, the receiver of the Michigan Company clearly can have no other right in the matter than to receive any remaining surplus from the securities, after the lien rights have been satisfied, or to claim the reserve apportionment of any policyholders to whose rights he has succeeded by surrender of the policy or by equitable subrogation. It is admitted here that the securities involved are not equal in value to the net cash value of the policies. But, whatever the value of the securities, the rights of the receiver could not in any event have priority over the lien rights for which the Insurance Commissioner was authorized to act.

"To say, therefore, that the legislature of Iowa could not provide an independent, substantive method of confirming and enforcing the paramount lien rights existing under Iowa law, without subserviency to the Michigan courts, is to me a denial of the sovereignty of that state. To what extent the policyholders may actually desire to avail themselves of their distributive rights under the Iowa law, in preference to accepting reinsurance privileges in the Indiana Company—which has agreed to take over the Michigan Company's risks, but with an initial lien of seventy-five per cent against the reserves—is for the policyholders themselves or their successors in rights to say in the Iowa proceedings.

"The fact that the Iowa Commissioner has been constituted a receiver by the Iowa courts does not involve a basic jurisdictional clash with the Michigan courts, of which cognizance can be taken here. First, as I have pointed out, the rights of the Michigan receiver in the property are clearly subordinate to those of the lien beneficiaries, until the existing liens have been satisfied under Iowa law. Again, any clash between receiverships arises simply out of the method of lien enforcement which the State of Iowa has provided in the situation. On the fundamental question to be considered, the fact that provision has been made for enforcing the liens by a specific receivership does not present any different situation than if a simple action in foreclosure were involved."

The record pleadings and facts establish the diversity of citizenship and residence of the petitioner and each of the respondents and that the amount or value in controversy exceeds the jurisdictional requirement. The situs of the securities or the *res* is in the Southern District of Iowa. The Iowa Receiver as representative of the State of Iowa is in possession of the securities by direction and decree of the Iowa State Court. The purpose of this suit is to obtain a decree to declare the status of the parties under Iowa law, to remove claims and clouds upon the title to the personal property, to permit the Iowa Court without interference by respondents to administer said property through its receiver

to enforce prior liens created by the statutes of Iowa in favor of policyholders whose contracts originated in the Iowa Company and as provided in the policy contracts, the assumption agreements and the reinsurance agreements.

Petitioner respectfully urges that the decision and decree of the Circuit Court is erroneous in denying the Federal Court jurisdiction of the subject matter of this suit, thereby depriving petitioner of his rights under the Federal statutes, and should be reversed.

B.

Petitioner's action is not an interference with the administration by a state court of property of an insolvent insurance company within the prohibition of the authorities cited by the Circuit Court of Appeals in support of its decision.

The decision of the Circuit Court of Appeals reached the conclusion that the decree of the trial court (R. 501) constituted interference with the orderly administration of the property of the Michigan Company by the Michigan Commissioner of Insurance and impaired the jurisdiction of the Michigan Court in directing such administration. An examination of the cases cited by the Circuit Court in support of its reasoning shows the cases are readily distinguishable from the factual and legal questions in the case now before this court. The cases cited in the majority opinion of the Circuit Court of Appeals belong to that line of authorities which hold that where a State Court has already taken possession of the assets of a local corporation through the appointment of a receiver, the Federal Court in the same State, subsequent to the action of the State Court, will not be permitted to interfere with the administration of such assets by said State Courts.

Lion Bonding & S. Co. v. *Karatz*, 262 U. S. 77, 67 L. Ed. 871, is a case where the State Court in Nebraska had ap-

pointed a statutory receiver for a Nebraska corporation, and the Nebraska Federal Court was held to be without authority to appoint a receiver or interfere with the jurisdiction of the Nebraska State Court, subsequent to the assuming of jurisdiction by the State Court.

Holley v. *General American Life Ins. Co.*, 101 Fed. (2d) 172 (C. C. A. 8), is a case where a Missouri State Court had approved the acquisition of a Missouri life insurance company by the General American Company, and subsequently the Federal Court of Missouri refused to consider a case in which it was alleged that the transfer was fraudulent and that a Federal Court receiver should be appointed.

Motlow v. *Southern Holding & Securities Corporation*, 95 Fed. (2d) 721 (C. C. A. 8), was a suit where a State Court of New York had appointed a statutory receiver for a New York corporation and subsequently a creditor who had already submitted himself to the jurisdiction of a New York State Court, brought suit in the Federal Court in Missouri seeking to set aside alleged fraudulent transfers. The Missouri Federal Court refused to take jurisdiction, holding that the plaintiff failed to show that the statutory liquidator had abandoned the alleged cause of action and that he had exhausted his remedies in New York.

Genecov v. *Wine*, 109 Fed. (2d) 265 (C. C. A. 8), is the case cited most frequently by the Circuit Court of Appeals and is a case in which the Arkansas State Court had appointed a receiver, plaintiff had proved his claim as a creditor in the Arkansas State Court and then plaintiff attempted subsequently in the Federal Court in Arkansas to secure payment of his claim in full by means of a garnishment, and the Federal Court rightly refused to interfere with the State Court's administration of the receivership in the same State.

O'Neil v. *Welch*, 245 Fed. 261 (C. C. A. 3), is an action where it was held that the Federal District Court for

Pennsylvania erred in appointing a receiver for a Pennsylvania Company when the Pennsylvania Insurance Commissioner had previously commenced action in a Pennsylvania State Court, pursuant to statute, looking toward a liquidation of the Company.

When consideration is given to the fact that in the case at bar the Federal Court in Iowa is asked to render a decree with reference to the right to administer for the enforcement of a lien upon property within the State of Iowa, which, under the statutes of Iowa, is subject to administration in Iowa, and which has never been in the possession of the receiver appointed by the Michigan court, either directly or through an ancillary receiver, it is apparent that the decree of the Federal District Court in Iowa is not an interference with the administration of the property by the Michigan receiver or the Michigan Court within the meaning of the authorities relied upon by respondents and cited by the majority opinion of the Circuit Court of Appeals.

II.

THE CIRCUIT COURT OF APPEALS IN DENYING JURISDICTION OF THE FEDERAL COURT ON THE THEORY THAT THE MICHIGAN RECEIVER BECAME STATUTORY SUCCESSOR OF THE INSURANCE COMPANY, WITH TITLE TO ITS PROPERTY WHEREVER SITUATED, OVERLOOKED THE ESTABLISHED RULES OF LAW THAT

A.

A statutory successor's title is subject to the same liens and equities as the corporation;

B.

The statutory successor's right to administer the corporation's property is subject to the public policy of the state where the property is situated, in accordance with the statutes and laws of the state.

The Circuit Court of Appeals held that the Insurance Commissioner of Michigan, as Receiver, became statutory successor of the insolvent Company and that the Michigan Court thereby acquired jurisdiction over all property of the Company. (R. 498.) In support of this conclusion the Court cites the leading case of *Relf* v. *Rundle*, 103 U. S. 222, 26 L. Ed. 337. But an analysis of the case shows it is not an authority which would avoid the well settled rules that a statutory successor's title is subject to the same liens and equities as was the corporation, and that his right to administer the corporation's property is subject to the public policy of the State where the property is located.

Relf v. *Rundle* was decided by this Court upon a petition for removal to the Federal Court. The facts are that a statute of Missouri provided that the assets of an insolvent insurance company should vest in the Superintendent of Insurance in that State. The Life Association of America was decreed insolvent and was dissolved, and its assets were decreed to have vested in one Relf. In the meantime, suits were brought in Louisiana to subject property in that State to local claims. Relf voluntarily appeared, claimed he was the sole owner of the property and, on the ground of diversity of citizenship, asked for removal to the Federal Court. This court found from the face of the pleadings that there was no lien claimed upon the assets in Louisiana in favor of the local creditors or policyholders, and that title was vested in Relf under the Missouri statute and the decree directing its enforcement. The case is therefore one of a citizen of one State suing for his property in another State and seeking removal from the State to the Federal Court. In the course of its opinion in the *Relf* case this Court says:

> "Relf is not an officer of the Missouri State Court but the person designated by law to take the property of any dissolved insurance company of that State and hold and dispose of it for the use and benefit of creditors

> and parties interested. The law that clothed him with that trust was in legal effect part of the charter of incorporation."

By reason of the same legal principle the statutes of Iowa, particularly Section 8663 of the Code of Iowa (R. 221) became a part of the charter of the Iowa Company and made the petitioner the Iowa Commissioner of Insurance, liquidating agent for all assets deposited in Iowa pursuant to said statute, and vested title thereto in the State of Iowa.

This Court having found the case of *Relf* v. *Rundle* a proper one for removal to the Federal Court, the case went back to the Federal District Court for trial on the merits and the case of *Davis* v. *Life Assn.*, 11 Fed. 781, was one of the issues tried. In the *Davis* case the Court found that while the articles of incorporation of the Insurance Company provided that certain of the funds of the Company should be invested in each of the States in which it did business, this provision was for the purpose of stimulating public interest in the Company and had nothing to do with a segregation of the funds in that particular State or district for any policy holder. In this connection in the *Davis* case the Court said:

> "The true construction, then, of the contract of April 26, 1869, is to be determined; and it is to be observed the fifth section quoted, *supra*, while it does provide 'that the net assets of the business of said department shall be invested and kept invested within the State of Alabama', yet it is not specific as to the particular purpose and object of the investment. It does not provide that this fund so created and so to be invested and kept invested, shall be for the benefit and security of the policy holders of the department of Alabama, or for the particular benefit or security of any policyholders or persons whatever. The idea of specific security or trust, other than the general trust and security which attaches to the property and assets of a corporation for the benefits of its creditors, is not in the words employed in this fifth section of the contract."

The turning point of the case of *Davis* v. *Life Assn.* is the simple fact that there was no lien of any kind upon the assets within the State of Alabama and that therefore equity would require their general distribution among the policy holders in all States.

The factual situation, i.e., the absence of any provision for a lien upon the assets in a particular State, clearly distinguishes all of the decisions of this Court and the subordinate Federal Courts in the *Life Assn. of America* litigation, from the theory on which petitioner is proceeding in the case now before this Court. It has at all times been the position of petitioner Fischer that the securities of the American Life Insurance Company deposited in Iowa were segregated and set apart definitely for the benefit of the policyholders of the Iowa Company, under both the statutes of Iowa (R. 221) and the reinsurance agreements (R. 203-218) and the terms of the policies and assumption agreements themselves (R. 229-233, 227) and that the reinsurance of the Iowa Company's business by the Michigan Company necessarily was on condition and in consideration that said securities in Iowa were subject to this prior lien.

Certain other decisions of the Federal Courts may be relied upon by respondents in support of the above mentioned conclusion of the Circuit Court of Appeals, but an examination of each of these cases will demonstrate that in each of them there was no fund made subject to a lien for a particular class of policyholders either by statute or by contract, and also that the companies there involved were mutual companies and the policyholders as members thereof were held to be bound by the company's charter and the laws of the State of the Company's domicile providing for administration by the statutory successor. The cases referred to are:

Rundel v. *Life Ass'n. of America*, 10 Fed. 720,
Taylor v. *Life Assn. of America*, 13 Fed. 493,
Parsons v. *Charter Oak Life Ins. Co.*, 31 Fed. 305,
Fry v. *Charter Oak Life Ins. Co.*, 31 Fed. 197.

In the case at bar both the American Life of Des Moines, Iowa, and the American Life of Detroit, Michigan, were stock companies and the question of the effect of a mutual organization is therefore not here involved.

A.

A statutory successor's title is subject to the same liens and equities as the corporation.

The argument that under Michigan statutes respondent Michigan Receiver is statutory successor of the insolvent Company, with title to all of its assets does not exclude a primary receivership in this State. The rule is well recognized that a receiver takes possession of the property of an insolvent company subject to all liens and equities which exist at the time, and such receiver does not take any greater title than the corporation had.

Phila. Fourth St. Nat. Bank v. *Yardley,* 165 U. S. 634; 41 L. Ed. 855.
Scott v. *Armstrong,* 146 U. S. 499; 36 L. Ed. 1059.
In Re: Farmers & Merchants State Bank, 194 Mich. 200, 160 N. W. 601.

The respondent Michigan Receiver therefore took whatever interest the American Life Insurance Company of Michigan had in the securities on deposit in Iowa, subject to the lien imposed thereon and the right of the petitioner Iowa Insurance Commissioner to administer said assets for the benefit of the policies on which they were deposited, pursuant to the Iowa statutes (R. 220-221) and the reinsurance agreements, policy contracts and assumption agreements (R. 204. 229, 227). The trial court so held as follows (R. 442):

> "The Iowa court took possession and control not of all assets in Iowa of the Michigan Company in an ancillary proceeding, but as a primary proceeding for the purpose only of administration of the deposit in the

hands of the Commissioner of Insurance of Iowa in accordance with the statutes of Iowa which, as above determined, were a part of the contract between the Insurance Companies and the holders of the insurance policies. If this is a correct hypothesis, then the Michigan Court never had actual or constructive possession of these deposited securities for administrative purposes."

B.

The statutory successor's right to administer the corporation's property is subject to the public policy of the state where the property is situated, in accordance with the statutes and laws of the state.

That respondent Michigan Receiver, as statutory liquidator and successor to the American Life Insurance Company under the laws of Michigan, is entitled to recognition as such in the State of Iowa is not questioned. *Clark* v. *Williard*, 292 U. S. 112, 78 L. Ed. 1160. However, this does not mean that respondent and the Michigan State Court which appointed him may disregard the law of the State within which assets of the Company are located. The title of a statutory successor is subordinated to the local policy of the state within which the assets are located. *Clark* v. *Williard*, 294 U. S. 211, 79 L. Ed. 865. In this last case it was held that the statutory successor to an Iowa corporation was as far as property situated in Montana was concerned, subject to such liens as the laws of Montana saw fit to permit to be enforced against such property. This court, in *Clark* v. *Williard*, said:

> "Iowa may not say, however, that a liquidator with title who goes into Montana may set at naught Montana law as to the distribution of Montana assets, and carry over into another State the rule of distribution prescribed by the statutes of the domicile."

Paraphrasing those words of this court as applied to the instant case: "Michigan may not say that a statutory

liquidator appointed by the Michigan State Court may set aside Iowa law as to distribution of Iowa assets, and carry over into Iowa the rule of distribution prescribed by the statutes of the domicile, Michigan." The Iowa statutes, particularly Sections 8661-8663 (R. 220-221) subject the securities on a deposit in Iowa to a lien and prescribe the method by which the same shall be administered and the lien enforced by petitioner. Also, as indicated elsewhere in this brief, Division VII, the declared policy of the State of Iowa is to subject funds within the State to local claims, rather than to forward the assets to a foreign receiver. Under the rule of the *Clark* case respondent Michigan Receiver cannot expect that the above mentioned statutes and the public policy of Iowa as announced in the decisions of its highest court, will be disregarded. On the contrary, the Federal District Court under the doctrine of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188, is required to give effect to the Iowa statutes and decisions and to determine the right of petitioner to administer the deposited securities and the enforcement of the lien, the same as the courts of Iowa would.

III.

THE CIRCUIT COURT OF APPEALS ERRED IN FAILING TO HOLD THAT UNDER SECTION 8663, CODE OF IOWA, THE SECURITIES ON DEPOSIT WITH THE INSURANCE COMMISSIONER OF IOWA ON INSOLVENCY VESTED BY OPERATION OF LAW IN THE STATE OF IOWA FOR THE BENEFIT OF POLICYHOLDERS FOR WHOM SUCH DEPOSITS WERE MADE.

The purpose of this suit was to obtain a decree in the Federal Court to determine the status of the parties under the Iowa law as between the petitioner and nonresident parties defendant, to prevent active interference by the nonresident defendants with administration upon the personal property by the Iowa State Court, to remove adverse claims

and a cloud upon the title to personal property within the Southern District of Iowa in favor of policyholders whose contracts originated in the Iowa Company prior to the contracts with the Michigan Company. The deposited securities with the Insurance Commissioner of Iowa now in his possession as Receiver is the personal property referred to.

The decree of the Federal District Court decided these issues in favor of your petitioner and held that the Court had jurisdiction of the parties and the subject matter. The trial court, referring to jurisdiction to appoint an Iowa receiver for the deposited Iowa assets, said (R. 445):

> "I see nothing in the contention of the defendants that this court and the courts of Iowa are without jurisdiction in this proceeding. As I have heretofore held, and as I have tried to point out herein, the state is attempting to protect by a primary receivership property in the hands of the state. * * * The Iowa receiver has the sole and exclusive right to administer these funds because of the statutes of Iowa, and because of the reinsurance contract."

Under decision and decree of the Iowa State Court, filed October 30, 1939, (R. 304) title to all securities deposited with the Commissioner of Insurance vested in the State of Iowa pursuant to Sections 8661-8663 of the Code.

Section 8661, Code of Iowa 1939, provides as follows:

> "*Injunction — receivership — dissolution.* If upon such examination the commissioner is of the opinion that the company is insolvent, or that its condition is such as to render its further continuance in business hazardous to the public or holders of its policies, he shall advise and communicate the facts to the attorney general, who shall at once apply to the district court of the county or any judge thereof, where the home office of a domestic company or an agency of a foreign company is located, for an injunction to restrain the company from transacting further business except the payment of losses already ascertained and due, until further hear-

ing, and for the appointment of a receiver, and, if a domestic company, for the dissolution of the corporation. The judge of such court may grant a preliminary injunction with or without notice, as he may direct."

Section 8662, Code of Iowa 1939, provides as follows:

"*Decree.* The court, on the final hearing, may make decree subject to the provisions of Section 8663 as to the appointment of a receiver, the disposition of the deposits of the company in the hands of the commissioner, and its dissolution, if a domestic company."

Section 8663, Code of Iowa 1939, provides as follows:

"*Securities.* The securities of a defaulting or insolvent company, or a company against which proceedings are pending under Sections 8661 and 8662, on deposit shall vest in the state for the benefit of the policies on which such deposits were made, and the proceeds of the same shall, by the order of the court, upon final hearing, be divided among the holders thereof in the proportion of the last annual valuation of the same, or at any time be applied to the purchase of reinsurance for their benefit."

The above sections by their terms apply to foreign as well as domestic Insurance Companies.

This was for the benefit of the policies issued by the Iowa Company prior to the reinsurance contract. The title vested as of the date of the insolvency of the Michigan Company, which the Court below found to be April 12, 1938 (R. 437).

Where an insurance company authorized to do business in Iowa becomes insolvent the insurance commissioner must make application to the attorney general for the appointment of a receiver. Code of Iowa, Section 8661. If such company has securities or properties on deposit with the Iowa Insurance Commissioner, such assets forthwith vest in the State of Iowa for the benefit of the policies on which such deposits were made. Code of Iowa, Section 8663. And

on final liquidation the proceeds of such deposits shall by order of court be divided among said policyholders in proportion with the last annual valuation of the same, or applied to the purchase of reinsurance for their benefit. Code of Iowa, Section 8663.

Code of Iowa, Section 8613.1 requires the Commissioner of Insurance to be receiver or liquidating officer (R. 218). The statutes are mandatory. There was no alternative. Under this statute the Iowa deposit must be administered for the benefit of the policies on which the deposit was made, and by an independent receiver, for the Code so provides. Code of Iowa, Section 8665, requires the collection of income from the deposited securities. To turn over the Iowa deposit to the reinsuring company would nullify all the statutes. The statutes inhere in the policy contracts, the assumption agreements and become a part of the reinsurance contracts entered into by the Iowa and Michigan Companies. *Whitfield* v. *Aetna Life Ins. Co.*, 205 U. S. 489, 51 Law Ed. 895 at 898; *Taylor* v. *Merchants & Bankers Insurance Co.*, 83 Iowa 402, 49 N. W. 994.

The Michigan Company was adjudicated to be insolvent as of April 12, 1938, by the Federal District Court and the Michigan State Court. It is petitioner's position, that, under Section 8663, Code of Iowa 1939, quoted above, upon insolvency, title to the securities on deposit with the Commissioner of Insurance of Iowa, by operation of law, immediately vested in the State of Iowa for the benefit of the policies on which such deposits were made, which were the policies issued by the Iowa Company prior to the reinsurance contract. The decision of the Circuit Court of Appeals holds:

> "The Michigan Court decreed that under the statutes of that State (Section 12,266 Compiled Laws of Michigan 1929), title to all the assets of the Michigan Company vested in the Commissioner of Insurance of Michigan as receiver on April 12, 1938", (R. 499).

The date of the decree of the Michigan State Court was September 16, 1939, (R. 285-286). The Michigan statute quoted in the Court's statement did not have the provision similar to the Iowa statute but provided for the vesting of title by judicial proceeding as of the date of the order directing the Commissioner to liquidate the business of the Company, which was September 16, 1939. The Circuit Court of Appeals, therefore, is in error in holding:

> "We think that on April 12, 1938, the securities belonging to the Michigan Company on deposit in Iowa were legally in the possession, actual or constructive, of the Michigan Company, and that therefore the Michigan Court, through the insolvency proceedings commenced in that State, acquired jurisdiction to administer them and to determine what the rights of policyholders, creditors and all others claiming interests in them were. Actual possession of the deposited securities by the Commissioner of Insurance of Iowa which on April 12, 1938, were not being held adversely to the Michigan Company, would not prevent the Michigan Court from acquiring such jurisdiction" (R. 499).

In order to reach the conclusion above stated, the Circuit Court of Appeals ignored and refused to apply the law of the State of Iowa which vested the title in the State of Iowa immediately upon insolvency. Since, for the purpose of administration and enforcement of local liens created by the laws of Iowa, the title vested in the State of Iowa before adjudication by the Michigan State Court, the Michigan Court was prevented from acquiring jurisdiction of the deposited securities in the actual possession of the Commissioner of Insurance of Iowa on April 12, 1938.

The error in the decision of the Circuit Court in failing to hold that, upon insolvency of the Michigan Company, title to securities on deposit with the Insurance Commissioner of Iowa vested by operation of law in the State of Iowa, is clearly demonstrated.

IV.

THE CIRCUIT COURT OF APPEALS ERRED IN COLLATERALLY ATTACKING THE APPOINTMENT OF PETITIONER AS RECEIVER AND DENYING THE JURISDICTION OF THE IOWA STATE COURT.

The Circuit Court of Appeals holds:

> "The Michigan Court in appointing a statutory receiver under the laws of Michigan necessarily ruled that it had power to do so and its determination in that regard is not subject to collateral attack either in the court below or in this court" (R. 498).

and,

> "Our conclusion is that the court below lacked the jurisdiction because the Michigan Court had first acquired jurisdiction of the securities deposited in Iowa. But even if that conclusion were not justified, we would still be of the opinion that the court below could not be called upon to decide which of the two state courts has the right to administer these assets of the Michigan Company and to determine controversies respecting them. The decrees and rulings of these two state courts relative to their respective jurisdictions are not subject to review or to collateral attack in a federal court" (R. 502).

Petitioner agrees the rule of law is correct, that the respective jurisdictions of the Michigan and Iowa Courts are not subject to review or to collateral attack in a Federal Court. The error is that the Circuit Court of Appeals in holding, "our conclusion is that the court below lacked jurisdiction because the Michigan Court had first acquired jurisdiction of the securities deposited in Iowa", is incorrect because its very statement is a collateral attack on the jurisdiction of the Iowa State Court and is an erroneous conclusion of law under the facts and law applicable in this case.

The Circuit Court of Appeals further holds:

> "If, by reason of the reinsurance agreements and the laws of Iowa, the Iowa Court has sole jurisdiction

> over the securities of the Michigan Company on deposit in Iowa, as appellee contends, it is the duty of that court to exercise it. If the Michigan Court, on the other hand, has such jurisdiction, as we think it has, it must resolve the controversy over these assets" (R. 503).

This statement of the Court is a collateral attack, contrary to its own pronouncement of the correct rule, upon the jurisdiction of the Iowa State Court and is particularly objectionable as an attempt to decide the merits of the subject matter of the suit over which it holds it has no jurisdiction.

This error of the Circuit Court naturally follows its failure to recognize and hold that, upon insolvency of the Michigan Company, title to the securities on deposit with the Insurance Commissioner vested, by operation of law, in the State of Iowa.

V.

THE CIRCUIT COURT ERRED IN HOLDING THAT THE COMMISSIONER OF INSURANCE OF IOWA WAS A MERE CONTRACTUAL CUSTODIAN, BAILEE OR PLEDGEE OF THE SECURITIES DEPOSITED WITH HIM, WHEN THE STATUTES OF IOWA CONSTITUTED HIM A TRUSTEE WITH TITLE FOR THE PURPOSE OF ENFORCING A PROTECTIVE LIEN IN FAVOR OF EACH INDIVIDUAL POLICYHOLDER ORIGINATING IN THE IOWA COMPANY.

It is important that at all times there be kept in mind the fact that the deposit of securities in the State of Iowa originated and was maintained as a result of both statutory requirements and contractual undertakings, either of which would sustain the position here taken by petitioner.

The American Life Insurance Company of Des Moines was organized under the laws of the State of Iowa and by virtue of Iowa statutes was required to maintain a deposit with the Iowa Commissioner of Insurance to cover the net value or legal reserve of its policies.

Section 8665, Code of Iowa 1939, provides:

> "The net cash value of all policies in force in any such company being ascertained, the commissioner shall notify it of the amount, and within thirty days thereafter the officers thereof shall deposit with the commissioner the amount of the ascertained valuation in the securities specified in Section 8737" (R. 220).

The maintenance of said deposit was a condition of the Iowa Company's existence and of the continuance of its doing business both in Iowa and in other states. The continuance of the deposit with the Iowa Commissioner was one of the undertakings of the Iowa Company under its policy contracts, since the statutory laws of Iowa inhered in and were a constituent part of each contract.

> *Whitfield* v. *Aetna Life Insurance Co.*, 205 U. S. 489, 51 Law Ed. 895.
> *Taylor* v. *Merchants and Bankers Insurance Co.*, 83 Iowa 402, 49 N. W. 994.

Moreover, the undertaking to maintain such deposit in the State of Iowa was made a provision of each policy by the express terms thereof. Each policy contract contained on its face in large letters the following:

> "THIS CONTRACT IS PROTECTED BY A DEPOSIT OF APPROVED SECURITIES WITH THE STATE OF IOWA" (R. 229).

and each policy contract contained the provision:

> "The legal reserve on this Policy shall be invested in approved securities and deposited with the State of Iowa as provided by law" (R. 233).

Both by virtue of the Iowa statute and the express provisions of their insurance contracts, which the Michigan Company did not attempt to re-write, the policyholders of the Iowa Company are entitled to the benefits of the Iowa deposit, which provide a protective lien in favor of each individual policyholder.

Chapter 409 of the Code of Iowa 1939 provides that no life insurance company organized under Iowa law shall consolidate with any other company or reinsure its risks unless such plan is approved by a commission composed of the Governor of Iowa, the Commissioner of Insurance, and the Attorney General (R. 223-225).

Section 9105 of said Code provides:

"No company organized under the laws of this state to do the business of life insurance * * * shall consolidate with any other company or reinsure its risks or any part thereof with any other company, or assume or reinsure the whole or any other part of the risks of any other company except as hereinafter provided * * *" (R. 223).

Section 9106 provides:

"When any such company shall propose to consolidate or enter into any reinsurance contract with any other company, it shall present its plan to the Commissioner of Insurance, set forth the terms of its proposed contract of consolidation or reinsurance, asking for the approval or any modification thereof * * *" (R. 224).

Section 9107 provides:

"The commission shall proceed to hear and determine such petition, without notice * * *" (R. 224).

Section 9108 provides:

"For the purpose of hearing and determining such petition, a commission consisting of the governor, commissioner of insurance, and attorney general, is hereby created * * *" (R. 224).

Section 9111 provides:

"Said commission, if satisfied that the interests of the policyholders of said company or companies are properly protected and no reasonable objection to said petition exists, may authorize the proposed consolidation or reinsurance or may direct such modification thereof

as may seem to it best for the interests of the policyholders; and said Commission may make such order and dispose of the assets of any such company thereafter remaining as shall be just and equitable" (R. 224).

Section 9112 provides:

"Such consolidation or reinsurance shall only be approved by the consent of all of the members of said commission, and it shall be the duty of said commission to guard the interests of the policy holders of any such company or companies proposing consolidation or reinsurance" (R. 224, 225).

Section 9114 provides:

"Any plan of consolidation or reinsurance submitted as herein contemplated must have first been approved by the commission, and the result of said vote must be filed with the commissioner of insurance and be by him determined before any consolidation or reinsurance shall be effected" (R. 225).

The contracts of reinsurance entered into between the American Life Insurance Company, of Des Moines, Iowa, and the American Life Insurance Company, of Detroit, Michigan (R. 203, 208, 215), contain a provision that the transfers thereunder were made subject to the requirements of the statutes of the State of Iowa relative to the deposit with the Commissioner of Insurance of Iowa (R. 207, 211, 217). The contracts also provided that the Michigan Company agreed to then and there maintain at all times the deposits required by the statutes of Iowa, with the Iowa Commissioner both in amount and character of securities as would have been required of the Iowa Company (R. 207, 211, 217). The provisions of the contracts are as follows:

"* * * and covenants and agrees to and with the said American Life Insurance Company, of Des Moines, Iowa, and to and with each of the holders of the policies and contracts herein referred to, * * *" and

"5. *The transfer hereby made is subject to the requirements of the statutes of the State of Iowa, relative to the deposit with the Commissioner of Insurance of that State of securities representing the net cash value of outstanding contracts* of life insurance, endowments, or annuities, and it is understood that many of the securities hereby transferred are now in the custody of said Commissioner of Insurance of the State of Iowa by virtue of deposits made in pursuance of such statutes.

"6. It is further agreed by said American Life Insurance Company, Detroit, Michigan, *that the deposit required by the laws of the State of Iowa to be made with the Commissioner of Insurance on all contracts of life insurance, endowments, or annuities issued by said American Life Insurance Company, of Des Moines, Iowa, and hereby reinsured, will be now and hereafter maintained at all times, both in amount and character of securities, as would have been required of said American Life Insurance Company, of Des Moines, Iowa, under the laws of said State of Iowa.* The amount of such deposit required shall be determined by valuation of policies to be made on January first and July first of each year."

This is not a case where deposits were made with a state officer merely for protection of creditors within the State, and, while such deposits are universally upheld by the courts, enforcement of the deposit in the instant case is supported by much stronger equities. The Iowa Company was an Iowa corporation and the deposit was maintained in Iowa for the benefit of all policyholders of the Iowa Company, whether residents of Iowa or elsewhere. Without the maintenance of the deposit there was no Iowa Company and there was nothing to be transferred to or consolidated with the Michigan Company as Judge Johnsen states "so far as the deposit was concerned it remained in practical effect domestic in character" (R. 506). The Michigan Company, by accepting the transfer took the certain benefits, and it also undertook certain obligations including that of maintaining the deposit securing the net value of the Des Moines policies. The Michigan Company had the benefits of this consolidation for almost

twenty years, and the respondents, the liquidating receiver, ancillary receiver in Texas and the company purporting to reinsure the Michigan Company's business, should not now be heard to repudiate the obligations and rights which vested under the Iowa deposit.

When the American Life Insurance Company of Detroit, Michigan, assumed the business of the Iowa Company in 1921, it issued a certificate of assumption to each Iowa Company policyholder which provided as follows:

> "This is to certify that the above numbered policy issued by the American Life Insurance Company of Des Moines, Iowa, has been assumed according to its terms, provisions and values by the American Life Insurance Company, Detroit, Michigan, *and the American Life Insurance Company, Detroit, Michigan, will carry out all the provisions of said policy and perform all of the obligations therein contained as fully as the same would or should have been performed by the American Life Insurance Company of Des Moines, Iowa,* * * *" (Exhibit "E", R. 227).

The claims made by respondents that under Michigan law title to all assets is in the Michigan Receiver and that laws of the State of Michigan are a part of the charter of the American Life Insurance Company, do not exclude a primary receivership in this State.

The trial court in its opinion (R. 442) states:

> "The Iowa court took possession and control not of all assets in Iowa of the Michigan company in an ancillary proceeding, but as a primary proceeding for the purpose only of administration on the deposit in the hands of the Commissioner of Insurance of Iowa in accordance with the statutes of Iowa which, as above determined, were a part of the contract between the insurance companies and the holders of the insurance policies. If this is a correct hypothesis, then the Michigan court never had actual or constructive possession of these deposited securities for administrative purposes."

This statement of the trial court has abundant support in the authorities. If the Michigan Company itself had only a conditional title to these assets; if there was a lien in favor of the policyholders of the Iowa Company; if the statutes of Iowa did not permit the Michigan Company to take absolute title, then it is difficult to see how the bringing of the receivership could give the title claimed.

A receiver takes possession of the property or title to the property subject to all liens and equities which exist at the time it is taken over by the receiver. He does not take over any more than the person, firm or corporation had. *Phila. Fourth St. Nat. Bank* v. *Yardley*, 165 U. S. 634, 41 L. Ed. 855; *Scott* v. *Armstrong*, 146 U. S. 499, 36 L. Ed. 1059; *In re Farmers and Merchants Bank*, 194 Mich. 200, 160 N. W. 601.

The respondent American United Life Insurance Company and the respondent Receiver of the Michigan Company, by their definite statements, seek to distribute the assets of the American Life Insurance Company in a manner unfair to the policyholders whom petitioner represents, in that these respondents seek to deny the Iowa Company policyholders the security which created a lien for them under the Iowa law and which this Court is bound to follow under the provisions of the *Federal Judiciary Act of 1789* and the recent decision of the United States Supreme Court in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188. Petitioner brings his complaint for the express purpose of realizing upon the protection provided the Iowa Company policyholders by Sections 8661-8663 of the Code of Iowa, the policy contracts, the assumption agreements and the reinsurance agreements on the part of the Michigan Company.

The State of Iowa has declared it to be its policy that the claim of a foreign receiver to funds of a corporation found in this State will not be recognized if the result would be to relegate the creditors of the corporation in this State to

the mere relief to which they would be entitled in a foreign jurisdiction when there are funds of the corporation in the State from which such claims may be satisfied. The Iowa Court has further stated that the rights of Iowa creditors to attach the funds of such a corporation are not a matter of procedure but one of substantive law. *Shloss* v. *Metropolitan Surety Co.*, 149 Iowa 382, 128 N. W. 384.

The decision of the Circuit Court of Appeals is in error in holding:

> "The Commissioner of Insurance of Iowa on April 12, 1938, had the actual physical custody of the securities of the Michigan Company on deposit in Iowa, but he had no title to them and neither he nor the State of Iowa had or claimed any proprietary interest in them. Whatever interest the Commissioner had *was contractual* and was concededly for the benefit of the holders of policies of the Michigan Company which originated in the defunct Iowa Company. The Iowa Commissioner was, with respect to the securities on deposit with him, a custodian, bailee or pledgee, depending upon what function he was required to perform under the *reinsurance agreements* pursuant to which the Michigan Company established and maintained the deposit" (R. 499).

The primary reason for the error of the Circuit Court in its reasons to justify the conclusion reached is founded upon the erroneous premise that the relation between the Commissioner of Insurance of Iowa as Receiver and the Michigan Company as to the deposited securities was purely contractual and the deposit of the securities with the Insurance Commissioner of Iowa a mere bailment. The Insurance Commissioner of Iowa was a statutory trustee under the statutes of Iowa to protect the lien created in favor of the policyholders whose contracts originated in the Iowa Company pursuant to the mandatory directions of the Iowa statutes. A holding to the contrary completely nullifies the Iowa statutes and the purpose for which they were enacted. The refusal of the Cir-

cuit Court to recognize and apply the statutes and la vs of the State of Iowa which create the lien and the right of confirming and enforcing a lien upon the deposited securities results in the erroneous conclusion. Since title to the deposited securities vested by operation of law in the State of Iowa, the Insurance Commissioner of Iowa became trustee with title as statutory designated liquidating officer of the State of Iowa. The statutes of Iowa required him to administer the deposited securities in accordance with their mandate. Under the facts in this case, as demonstrated in the documentary evidence, the statutes of Iowa inhere in the policy contracts, the assumption agreements and the reinsurance agreements and were statutory as well as contractual.

When the Iowa statutes and laws are considered, we believe that it must be held that the interest of the Commissioner of Insurance of Iowa and the State of Iowa was more than contractual and that his possession with respect to the securities on deposit was that of a statutory trustee, and that he and the State of Iowa not only claimed but had a proprietary interest in the securities and they were being held adversely to the Michigan Company for the following reasons:

Under the Iowa statutes the title to the deposited securities, by operation of law, vested in the State of Iowa upon the insolvency of the company, which was adjudicated to be insolvent on April 12, 1938.

The statutes of Iowa made the Insurance Commissioner of Iowa a trustee of the deposited securities for the purpose of enforcing the protective lien in favor of each individual policyholder of the Iowa Company prior to sale of the Company in 1921.

The Iowa statutes and laws inhere in the policyholders' contracts, the assumption agreement and the reinsurance agreement, which the Michigan Company agreed to complete

in accordance with the statutes of Iowa, the same as if the Iowa Company had remained a domestic company.

The transaction substituted the Michigan Company for the Iowa Company in the performance of every obligation existing under the policies and agreements for the policies originating in the Iowa Company pursuant to the provisions of the statutes of Iowa.

The statutes of Iowa were mandatory and enjoined the duties upon the Commissioner of Insurance of Iowa with respect to all of the deposited securities.

We respectfully urge that for the error pointed out in this division the decision should be reversed.

VI.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THERE IS A JURISDICTIONAL CLASH BETWEEN THE MICHIGAN AND IOWA COURTS IN THIS CASE.

The decision of the Circuit Court of Appeals contains the following:

> "The Iowa Receiver is of the opinion that it would be more advantageous for the holders of policies which originated in the Iowa Company to have the securities of the Michigan Company, on deposit in Iowa, administered by him in Iowa for the benefit, rather than to participate equally with the other policyholders of the Michigan Company in the reinsurance and management agreement with the Indiana Company made by the Michigan Receiver in the Michigan insolvency proceedings" (R. 497).

The above quotation, in the judgment of the petitioner, indicates the Circuit Court's misconception of the nature of this case. The Iowa statutes are mandatory and the duties of the Commissioner of Insurance of Iowa as receiver are defined (R. 220, 221, and Div. III of this Brief). The opinion of the Iowa Commissioner, while containing cogent practical

reasons for the administration of the Iowa securities as a unit (R. 377), are not controlling, since the procedure is prescribed by said Iowa statute.

The decision of the Circuit Court further states:

> "This action is directed at securing for a group of policyholders of the Michigan Company scattered throughout some forty-two states and several foreign countries, what the Commissioner of Insurance of Iowa conceives they are entitled to under the reinsurance agreement by which they became policyholders of the Michigan Company" (R. 500).

This quotation, in petitioner's judgment, likewise demonstrates the failure of the Court below to recognize that the relation between the parties to this controversy arises by virtue of the Iowa statutes (R. 220) as well as under the reinsurance agreements (R. 203, 208, 215).

As a result the Circuit Court of Appeals falls into error when it holds that the situation involves a jurisdictional clash of two receivership courts, that is, the Michigan and Iowa Courts, and that for this reason the Federal Court will not undertake to determine the case. The decision of the Circuit Court states:

> "There can be no practical justification for liquidating or reinsuring the business of the Michigan Company in segments or subjecting the same policyholders and the assets in which they are beneficially interested to the jurisdiction of two or three different courts working at cross purposes" (R. 500).

This statement indicates a misconception of the facts and the law applicable and arises from the failure to recognize provisions of the Iowa statutes and the decisions of the Iowa Supreme Court. The Circuit Court of Appeals has fallen into error because the Iowa Commissioner of Insurance is constituted a receiver by appointment of the Iowa court as an incident to the enforcement of a lien upon and

administration of the securities in Iowa. The fact that the Iowa Commissioner is a receiver does not involve a basic jurisdictional clash with the Michigan Court because of the following:

(1) The fact that there appears to be a question between the respective receiverships administered by the Iowa and Michigan Courts arises out of the method of enforcement provided by the statutes of Iowa;

(2) The rights of the Michigan receiver in the securities deposited in Iowa are clearly subordinate to those of the lien beneficiaries and petitioner as statutory trustee, until the existing liens have been satisfied under Iowa law;

(3) The only right which the Michigan receiver might have would be to ultimately receive under order of the Iowa Court any surplus remaining from the Iowa securities after the lien rights had been established and satisfied. It is admitted in the stipulation of facts between the parties that the deposited securities are not equal in value to the legal reserve or net cash value of the policies of the Iowa Company for which the lien was created by the Iowa law and that the amount of the deficiency in said deposit is at least 25 per cent (R. 199). In other words, under the record the Michigan receiver has no interest, even contingent in the deposited securities, since there is no surplus over and above the amount necessary to satisfy the paramount and prior lien rights of the policyholders of the former Iowa Company for whom petitioner as Iowa Insurance Commissioner and statutory trustee is authorized to act.

The dissenting opinion of Judge Johnsen in the Circuit Court of Appeals discusses the question as follows:

"Here the Federal Court was simply asked to perform the function of an Iowa state court in declaring the status of the parties under the Iowa law. This it clearly had jurisdiction to do and owed the duty of doing. No uncertainty could exist under the law of Iowa as to the lien rights against the deposit. The State of Iowa had a sovereign right to provide a substantive means of enforcing these lien rights, to which its laws had given

birth, upon property located in its jurisdiction, irrespective of whether any Michigan receivership ever existed. In the exercise of their substituted jurisdiction, it was the duty of the Federal Courts in this case to declare and give effect to Iowa law in the same manner as the courts of Iowa would have been obliged to do" (R. 507, 508).

The statutes of Iowa gave rise to the lien against the assets deposited in Iowa and provided a means of enforcing these liens (R. 218-226). The Circuit Court of Appeals erred in failing to declare and give effect to the Iowa statutes and decisions in the same manner as the Courts of Iowa would have done.

Erie Rd. Co. v. *Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188.

The above quoted dissenting opinion in the Circuit Court of Appeals supports the position urged by petitioner and should be sustained.

But the jurisdiction of the Iowa court to appoint a receiver is rested upon the additional ground that the right to appoint a receiver in this state is inherent in the fundamental principle of state sovereignty itself. A state court is limited in its jurisdiction to the territory of the sovereignty creating the court. A receiver is an officer of that court. It necessarily follows that the court appointing a receiver can only enforce its orders within its jurisdiction.

The decree appointing a receiver in one state will not of itself bind property in another state. Every jurisdiction in which it is sought by means of a receiver to subject property to the control of the court has the right to determine for itself who the receiver shall be. It may make such distribution of the funds realized within its own jurisdiction as will protect the rights of local parties interested therein, and not permit a foreign court to prejudice the right of local creditors by removing assets from the local jurisdiction.

When the administration extends to assets located in several jurisdictions, it is often convenient to apply in advance for the assistance of the different courts. When such application is made, the court to which it is addressed exercises its own jurisdiction. *G. W. Mining Co.* v. *Harris*, 198 U. S. 561, 49 L. Ed. 1163; *Fowler* v. *Osgood*, 141 Fed. 20; *Sands* v. *E. G. Greeley & Co.*, 88 Fed. 130.

When a court other than that of a domiciliary receiver appoints a receiver, the officer becomes its officer and is completly amenable to its control. His title to assets within the jurisdiction is derived from its decree or the statute of the state and does not depend on comity. The assets are in its custody and are to be disposed of as equity and the ordinary administration of justice requires. Its judgment and decree in respect to these assets must be accepted as conclusive by all courts, including the court appointing the domiciliary receiver. Clark on Receivers, 319; *Reynolds* v. *Stockton*, 140 U. S. 254, 35 L. Ed. 464.

It is apparent from the rule stated above that the District Court of Polk County, Iowa, had jurisdiction to appoint a receiver for the deposited assets within its jurisdiction, that is, within the State of Iowa. If there were any legal or equitable reason why Fischer, the Iowa Commissioner of Insurance, should not be appointed, or if there were reasons why the appointment should go to the respondent Michigan Receiver, he must apply to the Iowa court in the original proceeding, and if his application is timely made he would be heard according to his right. But so long as Fischer's appointment is not set aside by the court of appointment it may not be collaterally attacked. This is the elementary rule recognized and followed without exception by the courts. It is illustrated by the case of *United States* v. *Knott*, 298 U. S. 545, 80 L. Ed. 1321, where the United States intervened in a receivership other than the domiciliary receivership, and enforced its claim against the assets in the ancillary re-

ceivership because it had a lien thereon. It is elementary that the appointment of a receiver of the assets of a bankrupt in the state other than the domiciliary receiver cannot be collaterally attacked. Fischer has been appointed by the Iowa court receiver of the assets in its jurisdiction. This appointment is conclusive against collateral attack. *Lydick* v. *Neville*, 287 Fed. 479; *Vallery* v. *D. R. & G. Ry.*, 236 Fed. 176; *A. W. and L. Co.* v. *Towle*, 245 Fed. 706.

Since the court of Iowa has the right to decide for itself whether a receiver is desirable for the Iowa assets, this finding that the appointment is necessary is conclusive. The only review of this appointment must be by timely applications to the appointing court or by appeal.

The position of the Iowa Commissioner of Insurance as statutory Receiver will be recognized not only in the State of Iowa but in all other jurisdictions. *Clark* v. *Williard*, 292 U. S. 112, 78 Law Ed. 1160.

The rule is well recognized that a state has exclusive control over all the assets within its territory. It is a necessary corollary to this rule that no other state has jurisdiction to affect these assets.

G. W. Mining Co. v. *Harris*, 198 U. S. 561, 49 L. Ed. 1163.
Overby v. *Gordon*, 177 U. S. 214, 44 L. Ed. 741.

The Michigan Court therefore does not have jurisdiction over the assets located in the State of Iowa. The Iowa Court does have jurisdiction over these assets both because said assets are within the territorial boundaries of the State of Iowa and also because the Iowa statutes and the reinsurance agreements provide for the administration of the property by the Iowa courts.

Hale v. *Allinson*, 188 U. S. 56, 47 L. Ed. 380.
Shloss v. *Met. Surety Co.*, 149 Iowa 382, 128 N. W. 384.

Petitioner therefore urges that there is no jurisdictional clash between the Michigan and Iowa courts in this case, because, first, the administration of the assets in Iowa by the Iowa receiver arises from the method provided by the Iowa statutes and the reinsurance contracts, and, second, there can be no such clash where, as a matter of law, the Michigan court does not have jurisdiction over assets situated outside of its territorial limits.

VII.

THE CIRCUIT COURT OF APPEALS ERRED IN DETERMINING AN IMPORTANT QUESTION OF LOCAL IOWA LAW IN A MANNER DIRECTLY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT AND THE LAW OF THE STATE OF IOWA WHICH PERMIT A LIEN HOLDER OR CREDITOR TO PROCEED AGAINST AN INSOLVENT DEBTOR'S ASSETS IN THE STATE OF IOWA EVEN THOUGH A RECEIVER MAY HAVE BEEN APPOINTED BY THE STATE COURT OF THE INSOLVENT'S DOMICILE.

The Circuit Court of Appeals reaches the following conclusion concerning title to the deposited securities and jurisdiction of the Michigan Court thereof.

> "It is certain that, from and after April 12, 1938, the Commissioner of Insurance of Michigan, by virtue of the laws of Michigan and of the orders of the Michigan court in the insolvency proceedings, was the statutory successor of the insolvent Michigan Company, and as such had title to all of its assets wherever situated. *Relfe* v. *Rundle*, 103 U. S. 222, 225; *Clark* v. *Williard*, 292 U. S. 112, 120; *O'Neil* v. *Welch*, 4 Cir., 245 F. 261, 268. The Michigan court, on April 12, 1938, acquired jurisdiction over all of the property and business in the actual and constructive possession of the Michigan Company, and the exclusive right to determine all controversies respecting such property and business, since no other court had then taken possession of any of the assets of the Company" (R. 498).

Petitioner submits that this conclusion is erroneous because the Iowa statute (R. 221) vests title to such securities in the State of Iowa, by operation of law. However, under the rule laid down by the Court in the case of *Clark* v. *Williard*, 294 U. S. 211, 79 L. Ed. 865, the question of title may be disregarded because the matter of the determination and enforcement of liens against the deposit is governed by Iowa law and is within the jurisdiction of the Iowa Court which has taken possession of the deposited securities for that purpose. It is admitted in the record that the securities are in the possession of the petitioner, statutory receiver appointed by the Iowa State Court (R. 200). It is further admitted that the value of the deposited securities is insufficient to satisfy the lien which the statutes of Iowa created and which petitioner upon the direction of the Iowa State Court, is here seeking to protect and enforce. (R. 199.)

An examination of the case of *Clark* v. *Williard* is pertinent to an understanding of the conclusiveness of the matter of the policy of Iowa as determined by its statutes and decisions. In *Clark* v. *Williard*, an Iowa corporation had become insolvent and a controversy arose over conflicting claims to certain assets of the corporation located in Montana. The Iowa liquidator claimed the assets as against Montana judgment creditors who insisted upon the right to levy against the Montana assets. The Supreme Court of Montana gave priority to the local judgment creditors on the ground that the Iowa liquidator was not the corporation's successor but was a mere chancery receiver. This Court granted certiorari and in *Clark* v. *Williard*, 292 U. S. 112, 78 L. Ed. 1160, held "that under the statutes of Iowa the liquidator was the successor to the corporation and not a mere custodian, and that in ruling to the contrary, the Supreme Court of Montana had denied full faith and credit to the statutes of a sister State." The Court went on to state that the question was an open one whether there was "any local policy, expressed in

statute or decision, where by the title of a statutory successor was to be subordinated to later executions at the suit of local creditors." This Court remanded the case to the Supreme Court of Montana for the determination of this question. The Supreme Court of Montana thereupon held that the local policy of the State permitted attachments and executions against insolvent corporations, foreign and domestic, and that this rule prevailed against a statutory successor clothed with title to the assets just as much as against the corporation itself. This Court again reviewed the case, and, in *Clark* v. *Williard*, 294 U. S. 211, 79 L. Ed. 865, held:

> "Every state has jurisdiction to determine for itself the liability of property within its territorial limits to a seizure and sale under the process of its court." And
>
> "Montana does not challenge the standing of this foreign liquidator as successor to the dissolved corporation or as owner of its assets. On the contrary, his standing and ownership are now explicitly conceded. All that Montana does by the decree under review is to impose upon such ownership the lien of judgments and executions in conformity with local law. In this there is no denial to the statutes of Iowa or to its judicial proceedings of the faith and credit owing to them under the Constitution of the United States."

In further discussing the issues the Court states:

> "Some states prefer a rule of equal distribution and compel the local suitor to yield to the statutory successor, though at times with precautionary conditions. (Citing cases.) Other states give the local creditor a free hand with the result that he may seize what he can find, though the assets of the debtor are dismembered in the process. (Citing *Shloss* v. *Metropolitan Surety Co.*, 149 Iowa 382, 128 N. W. 384, and other cases.) Choice is uncontrolled, as between one policy and the other, so far as the Constitution of the nation has any voice upon the subject. Iowa may say that one who is a liquidator with title, appointed by her statutes, shall be so recognized in Montana with whatever rights and privileges accompany such recognition according to Montana law.

> For failure to give adherence to that principle we reversed and remanded when the case was last before us. Iowa may not say, however, that a liquidator with title who goes into Montana may set at naught Montana law as to the distribution of Montana assets, and carry over into another state the rule of distribution prescribed by the statutes of the domicile."

Under the holding of this Court in the case of *Clark* v. *Williard*, the securities on deposit in Iowa are subject in the Iowa Courts to the imposition of such liens and such administration as may be provided for by Iowa statutes and decisions. Even respondent, Michigan Receiver, in his Answer and Counterclaim, admits that his claimed title to the assets is subject to the local policy expressed in the statutes or decisions of Iowa which thereby subordinate his title to the rights of local creditors (R. 148, 160, 161). That it is the policy of the State of Iowa to subject Iowa assets of a foreign corporation to local administration and the imposition of liens thereon should not admit of any doubt. The statutes under which the securities here involved were deposited, Secs. 8661-8663, Code of Iowa, so provide (R. 220-221). Also, as pointed out by Circuit Judge Johnsen in his dissent (R. 506), even if the deposit had not been made pursuant to statute, but had been simply voluntary, it would have had equal significance and effect under Iowa law.

State ex rel Gibson v. *American Bonding & Cas. Co.*, 206 Iowa 988, 221 N. W. 585.

The policy of Iowa as stated by its Supreme Court has always been to permit the satisfaction of claims from the assets in Iowa belonging to a foreign corporation rather than to relegate the claimants to the foreign jurisdiction. In the case of *Shloss* v. *Metropolitan Surety Co.*, 149 Iowa 382, 128 N. W. 384, the Supreme Court of Iowa states the rule as follows:

"The well settled rule in this court is that the claim of a foreign receiver to funds of the corporation found in this State will not be recognized even by way of comity if the result would be to relegate the creditors of the corporation in this State to the relief to which they would be entitled in a foreign jurisdiction, when there are funds of the corporation in the State from which such claims may be satisfied."

This policy was reaffirmed by the Supreme Court of Iowa in the case of *Watts* v. *So. Surety Co.*, 216 Iowa 150, 248 N. W. 347, where the Court says:

"This is to the effect that domestic assets will not as against domestic creditors be transmitted to a foreign receiver or liquidator, if there is any danger that the latter's distribution thereof will be made in a manner unfair to the domestic creditors. * * *

"The intervener suggests that the plaintiff's claim be dismissed and that he be relegated to the receivership proceedings in New York for the purpose of presenting his claim. As stated by the rule announced in the case of *Shloss* v. *Surety Co.*, 149 Iowa 382, 128 N. W. 384, 385: 'The well-settled rule in this state is that the claim of a foreign receiver to funds of the corporation found in this state will not be recognized even by way of comity if the result would be to relegate the creditors of the corporation in this state to the relief to which they would be entitled in a foreign jurisdiction, when there are funds of the corporation in the state from which such claims may be satisfied."

Respondents may argue that the public policy referred to is qualified by the proviso, "if there is any danger that the latter's (foreign courts) distribution thereof will be made in a manner unfair to the domestic creditors." If there is any doubt as to what position the respondent Michigan receiver and respondent American United Life Insurance Company and the Michigan State Court take and will take if the question of the administration of the deposited securities for the benefit of the policyholders of the former Iowa Company, is

left to them to decide, an examination of the record is convincing as to their position. In both his Answer and his Counterclaim respondent, Michigan Receiver, denies that the securities are for the benefit of the policyholders originating under the Iowa Company and avers that said securities must be applied equally for the benefit of all policyholders of the Michigan Company (R. 149, 153, 161). Such also is the contention of the respondent American United Life Insurance Company (R. 164, 168, 176).

This Court, in *Clark* v. *Williard*, 294 U. S. 211, 79 L. Ed. 865, recognized and cites *Shloss* v. *Metropolitan Surety Co.*, *supra*, as illustrating the law of Iowa.

In view of the plain mandate of this Court that the law of a State as to the distribution of assets within its boundaries will be recognized and enforced, and the Iowa statutes and decisions primarily provide for the administration of and foreclosure of liens on a foreign insurance company's property in Iowa, the Circuit Court of Appeals was clearly in error in denying jurisdiction in the Federal Court to grant the relief here sought by petitioner and decreed by the trial court.

Petitioner's action is also sustainable upon another line of authorities as against the contention that a receiver had previously been appointed by a State Court in the State of the corporation's domicile.

It has long been recognized that the Federal Court has jurisdiction to entertain an action to foreclose a mortgage on property of a corporation, for which a State Court has appointed a receiver.

> *Empire Trust Co.* v. *Brooks*, 232 Fed. 641, Approved in *Harkin* v. *Brundage*, 276 U. S. 36, 44, 72 L. Ed. 457, 461.

It has been similarly held by the Circuit Court of Appeals for the Eighth Circuit that the trustee under a mort-

gage securing certain bondholders could foreclose the mortgage in Federal court although a receiver had been appointed by a State Court.

Rogers v. *Paving District*, 84 Fed. (2d) 555.

Upon the declared policy of the State of Iowa as governed by the decisions of this Court, we urge that petitioner as representative of the policyholders has the substantive right to enforce their liens against the insolvent Company's deposit in the State of Iowa even though a receiver has been appointed by a court of the State of the Corporation's domicile, and that the Circuit Court of Appeals erred in failing to so hold.

CONCLUSION.

It is therefore respectfully submitted that this court should reverse the decision and decree of the Circuit Court of Appeals.

JOHN N. HUGHES,
WILLIS J. O'BRIEN,
JOHN N. HUGHES, JR.,
Counsel for Petitioner.

APPENDIX.

Judicial Code, Section 24, amended, (28 U. S. C. A. Sec. 41):

Original jurisdiction. The district courts shall have original jurisdiction as follows:

(1) *United States as plaintiff: civil suits at common law or in equity.* First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens, or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made. The foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section. (R. S. Sections 563, 629; Mar. 3, 1875, c. 137, Sec. 1, 18 Stat. 470; Mar. 3, 1887, c. 373, Sec. 1, 24 Stat. 552; Aug. 13, 1888, c. 866, Sec. 1, 25 Stat. 433; Mar. 3, 1911, c. 231, Sec. 24, 36 Stat. 1091.)

Judicial Code, Section 57, (28 U. S. C. A. Sec. 118):

Absent defendants in suits to enforce liens. When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property

within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein within such district; and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same State, such suit may be brought in either district in said State. Any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said district court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law. (R. S. Secs. 738, 742; Mar. 3, 1875, c. 137, Sec. 8, 18 Stat. 472; Mar. 3, 1911, c. 231, Sec. 57, 36 Stat. 1102.)

Code of Iowa, 1939:

(The following statutes of the State of Iowa as set forth in the Code of Iowa, 1939, were on August 24, 1921, and now are in full force and effect:)

Chapter 395:

8613.1 *Ex officio receiver.* The commissioner of insurance henceforth shall be the receiver and/or liquidating officer for any insurance company, association or insurance carrier, and shall serve without compensation other than his stated compensation as commissioner of insurance, but he shall be allowed clerical and other expenses necessary for the conduct of such receivership.

Chapter 398:

8643 *Level premium plan companies.* Every life insurance company upon the level premium or the natural premium plan, created under the laws of this or any other state or country, shall, before issuing policies in the state, comply with the provisions of this chapter applicable to such companies.

8654 *Valuation of policies.* As soon as practicable after the filing of such statement, the commissioner of insurance shall ascertain the net cash value of every policy in force upon the basis of the American table of mortality and four and one-half per cent interest, or actuaries' combined experience table of mortality and four percent interest, in all companies organized under the laws of this state. For the purpose of making such valuation he may employ a competent actuary, who shall be paid by the company for which the service is rendered; but the company may make such valuation and it shall be received by the commissioner upon satisfactory proof of its correctness.

8655 *Deposit to cover valuation—policy loan agreements.* The net cash value of all policies in force in any such company being ascertained, the commissioner shall notify it of the amount, and within thirty days thereafter the officers thereof shall deposit with the commissioner the amount of the ascertained valuation in the securities specified in section 8737.

Any Iowa company may file a verified statement of the total amount of loans secured by its policies, and evidence of such indebtedness shall be checked by the commissioner at least semiannually. Such verified statement shall be taken and considered as a security to be deposited under the provisions of section 8741.

There may be included in the deposit an amount of cash on hand not in excess of five per cent of the deposit required, such deposit to be evidenced by a certified check, certificate of deposit, or other evidence satisfactory to the commissioner of insurance.

Deposits of securities may be made in excess of the amounts required hereby.

8660 *Examination.* The commissioner of insurance at any time may make a personal examination of the books, papers, securities, and business of any life insurance company doing business in this state, or authorize any other suitable person to make the same, and he or the person so authorized may examine under oath any officer or agent of the company, or others, relative to its business and management.

8661 *Injunction — receivership — dissolution.* If upon such examination the commissioner is of the opinion that the company is insolvent, or that its condition is such as to render its further continuance in business hazardous to the public or holders of its policies, he shall advise and communicate the facts to the attorney general, who shall at once apply to the district court of the county or any judge thereof, where the home office of a domestic company or an agency of a foreign company is located, for an injunction to restrain the company from transacting further business except the payment of losses already ascertained and due, until further hearing, and for the appointment of a receiver, and, if a domestic company, for the dissolution of the corporation. The judge of such court may grant a preliminary injunction with or without notice, as he may direct.

8662 *Decree.* The court, on the final hearing, may make decree subject to the provisions of section 8663 as to the appointment of a receiver, the disposition of the deposits of the company in the hands of the

commissioner, and its dissolution, if a domestic company.

8663 *Securities.* The securities of a defaulting or insolvent company, or a company against which proceedings are pending under sections 8661 and 8662, on deposit shall vest in the state for the benefit of the policies on which such deposits were made, and the proceeds of the same shall, by the order of the court upon final hearing, be divided among the holders thereof in the proportion of the last annual valuation of the same, or at any time be applied to the purchase of reinsurance for their benefit.

8664 *Change of securities.* Companies shall have the right at any time to change the securities on deposit by substituting a like amount of the character required in the first instance. If the annual valuation of the policies in force shows them to be less than the amount of security deposited, then the company may withdraw such excess, but twenty-five thousand dollars must always remain on deposit.

8665 *Interest on securities.* Companies having on deposit with the commissioner of insurance bonds or other securities may collect the dividends or interest thereon, delivering to their authorized agents the coupons or other evidence of interest as the same become due, but if any company fails to deposit additional security when and as called for by the commissioner, or pending any proceedings to close up or enjoin it, the commissioner shall collect such dividends or interest and add the same to such securities.

8741 *Securities deposited.* All such securities shall be deposited with the commissioner, subject to his approval and kept at such place or places and on such terms as he may designate, and shall remain on deposit until withdrawn in accordance with law, or the order of the commissioner.

8741.1 *Exchange of securities.* Any of the securities owned and held under the provisions of this chapter, including real estate owned and held, in its own office or on deposit with the insurance department may be exchanged for other securities and real estate authorized to be held under said chapter provided that it

appears that such exchange will strengthen the position of said company and be to its advantage and that such exchange shall receive the approval of the commissioner of insurance, and provided further that in the exchange of such securities the values may be placed upon such securities and real estate so received and shall be fixed and determined by the department of insurance but upon a valuation not relatively higher than that of any such securities so exchanged. Such securities and real estate so received may be accepted by the insurance department as eligible for reserve deposits. All acts and parts of acts insofar as they are in conflict with this section are hereby repealed.

Chapter 409:

9105 *Life companies—consolidation and reinsurance.* No company organized under the laws of this state to do the business of life insurance, either on the stock, mutual, stipulated premium, or assessment plan, shall consolidate with any other company or reinsure its risks, or any part thereof, with any other company, or assume or reinsurance the whole or any part of the risks of any other company, except as hereinafter provided; provided that nothing contained in this chapter shall prevent any company, as defined in section 9104, from reinsuring a fractional part of any single risk.

9106 *Submission of plan.* When any such company shall propose to consolidate or enter into any reinsurance contract with any other company, it shall present its plan to the commissioner of insurance, setting forth the terms of its proposed contract of consolidation or reinsurance, asking for the approval or any modification thereof, which the commission hereinafter provided for may approve. The company must also file a statement of its assets and if a legal reserve company, of the reserve value of its policies or contracts.

9107 *Procedure—Notice.* The commission shall proceed to hear and determine such petition, without notice. If the commission shall deem it necessary in order to conserve the interests of the policyholders that notice shall be given, it shall require the company or companies to notify, by mail, all of the members or

policyholders of the said company or companies of the pendency of such petition, and the time and place at which the same will be heard, the length of time of such notice to be determined by the commission.

9108 *Commission to hear petition.* For the purpose of hearing and determining such petition, a commission consisting of the governor, commissioner of insurance, and attorney general is hereby created. In the inability of the governor to act, the secretary of state may act in his stead.

9111 *Authorization.* Said commission, if satisfied that the interests of the policyholders of said company or companies are properly protected and no reasonable objection to said petition exists, may authorize the proposed consolidation or reinsurance or may direct such modification thereof as may seem to it best for the interests of the policyholders; and said commission may make such order and disposition of the assets of any such company thereafter remaining as shall be just and equitable.

9112. *Unanimous decision required.* Such consolidation or reinsurance shall only be approved by the consent of all of the members of said commission, and it shall be the duty of said commission to guard the interests of the policyholders of any such company or companies proposing consolidation or reinsurance.

9114 *Approval and filing with commissioner.* Any plan of consolidation or reinsurance submitted as herein contemplated, must first have been approved by the commission, and the result of said vote must be filed with the commissioner of insurance and be by him determined before any consolidation or reinsurance shall be effected.